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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, *Petitioner*,
vs.
ISKA W. CARMACK, *Respondent*,
} No. 40

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT ISKA W. CARMACK

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT ISKA W. CARMACK

PRELIMINARY STATEMENT.

Counsel for respondent are not satisfied with the statement of facts presented by the petitioner and are, therefore, submitting what we consider a more accurate and complete statement of facts contained in the voluminous record in this case.

STATEMENT OF THE CASE.

A Stipulation of an Agreed Statement of Facts was offered in evidence in its entirety on the trial of this cause and is hereinafter frequently referred to both in the Statement of the Case and the Argument. That Stipulation (R. 157-166) is printed in the Appendix, pages 1a-11a. Petitioner has ignored the Stipulation of Agreed Facts above mentioned in its Petition for Writ of Certiorari.

The undisputed facts disclosed by the record, which respondent believes fully support and establish the correctness of the opinion and decision of the Circuit Court of Appeals, may be grouped under the following headings:

1. **Present Public Uses of Proposed Site.**
2. **Destruction of Existing Public Uses Would Be Inevitable.**
3. **Exchange of Property Is the Basis of This Suit and Required Dismissal of Condemnation Petition.**
4. **The Record Shows That the Site Which Government Officers Selected Would Not Provide Suitable Accommodations for Court House, Post Office and Custom House as Required by Act of Congress of May 25, 1926, Cited and Relied Upon by Petitioner.**
5. **Government's Only Site Agent Recommended Selection of a Different Site.**

1. Present Public Uses of Proposed Site.

Item II of the Stipulation of Agreed Statement of Facts (R. 158, 160) (App. pp. 2a-4a) fully describes the present public uses of the property sought to be condemned.

The Stipulation is approved by **Harry J. McNerney**, Attorney for the Federal Works Agency. **Mr. McNerney** was called as a witness in this case by the Government. He stated he is Special Assistant General Counsel for the Federal Works Agency and assisted in preparing that Stipulation (R. 157-166) (App. p. 11a).

Referring to the contents of that Stipulation, which sets forth the basis upon which the selection of the site was made in this case, **Mr. McNerney** testified:

> "The Court: Were there material matters before the department on which they based a decision that are not in that agreed statement of facts or stipulation?
>
> A. Not to my knowledge.
>
> The Court: Is it your knowledge from an examination of the files in the department with which you are connected that this stipulation that you entered into covers material facts upon which the department based its decision?
>
> A. That is right" (R. 541-542).

The present public uses of the proposed site are fully and adequately stated in the opinion of the Circuit Court of Appeals, as follows:

> "The land sought to be taken by the United States was conveyed to the inhabitants of the Town of Cape Girardeau, predecessor of the City of Cape Girardeau, in 1820 to be held forever by the grantees as a public park for the use and benefit of the inhabitants of the town and the owners of adjacent lots. The City of Cape Girardeau has no power to convey any part of the public park nor to devote it to any use other than that specified in the deed under which it has been held by the City and its predecessor for more than a century. **Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W.**

938, 940; Carmack v. United States, 135 F. (2d) 196. That part of the park now sought to be condemned is occupied by the public library building of Cape Girardeau and by the local courthouse. The entire second floor of the courthouse is used by the court of common pleas, a court of record with jurisdiction in civil and criminal matters. The first floor is occupied by the offices of the City of Cape Girardeau, including the mayor, city engineer, city clerk, city council, and city attorney, and also by the clerk of the court of common pleas. The basement of the building is used largely for storage space for the files and records of the common pleas court. The library building is used as a meeting place for all local civic organizations. The property described in the Government's petition for condemnation is a tract measuring 280x240 feet near the center of the park" (R. 660, 661).

The record shows that the evidence on the second trial as to the present public use of the particular land described in Petitioner's Second Amended Petition in condemnation, as above quoted, is the same as the evidence on the first trial [135 F. (2d) 196, l. c. 198] and is the identical property described in Item II of the said Stipulation of Agreed Facts (R. 159, 160) (App. pp. 2a-4a).

At page 200 of the first opinion in this case [135 F. (2d) 196-200], the Court said:

> "The record shows without dispute that the property has been devoted to public use, not only because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

2. Destruction of Existing Public Uses Would Be Inevitable.

In affirming the judgment of the District Court on the second trial, the Court below correctly stated the facts shown by the Record, as follows:

"The District Court found on substantial evidence that taking by the Government of that part of the park sought to be condemned would result in the destruction of the use of the remainder of the tract as a park; would require the wrecking of the common pleas court building and the removal of the public library building and a public monument; and would materially interfere with the proceedings of the court of common pleas and with the transaction of city business in the courthouse building, and also with the plans for a civic center prepared by an expert employed by the local chamber of commerce for that purpose. The Court also found that there was no necessity for the taking of the land described in the petition for condemnation; that other sites in the City of Cape Girardeau were available for the proposed Federal Project; that the failure to secure the land in this proceeding would not result in the failure of the Federal Project; and that the park was not selected by the Federal Works Administrator and the Postmaster General as a site for the Federal building upon the considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal Agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated.

We cannot say that any of these findings of fact by the District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence. By this evidence it was shown that the United States owned a postoffice, courthouse, and customhouse building in the City of Cape Girardeau,

located on the most prominent corner of the city, opposite the leading hotels, convenient to the largest patrons of the postoffice, and nearer the center of free mail delivery in the City than any other available location. It further appears that adjoining the site on which the present Federal building stands are tracts of land which the United States may acquire by purchase or condemnation at reasonable cost, and which, together with the site presently owned by the United States, affords sufficient area for any necessary additions to the present building as well as for the construction of a new building. The site now owned by the United States, together with the adjoining available tracts, was selected by the only representative of the Postoffice Department and the Federal Works Agency who made a study of the relative merits of available sites in Cape Girardeau as the most desirable from the standpoint of the United States" (R. 661, 662) [151 F. (2d) 881, 882].

In this connection it should be noted that the Public Library site was not understood by the Committee to be included in the negotiations for exchange of property. **Mr. Meyers, Fourth Assistant Postmaster General,** in referring to this matter, testified in part as follows:

"Q. Do you know whether the original plan for the condemnation of a part of the park and courthouse contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site" (R. 137).

Louis Hecht, a prominent merchant on Main Street at Cape Girardeau, and the owner of some ten store buildings on Main Street, in referring to the condemnation of the Library site and building, testified, in part, as follows:

"Q. When did you first learn from any source that

the Public Library Building was included in this condemnation? * * *

A. When I first learned that the library is included in the condemnation proceedings?

Q. Yes, sir.

A. I never knew that the library was included. I have always been under the impression that if the postoffice is located where the courthouse is now that it would not affect the library, that the library would not be affected in any way, it would be left as it is" (R. 249).

The Stipulation of Agreed Facts—Item IV—referring to Public Library and Public Library Building, a part of property sought to be condemned, contains the following statement:

"It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organiaztions such as garden clubs, rose societies, historic societies, and other civic and public gatherings" (R. 157, 160) (App. p. 5a).

Undoubtedly referring to a referendum petition signed by over 2,000 citizens of Cape Girardeau protesting against an exchange of property (R. 444), in addition to the protests set out in the Report and Recommendations of **M. J. Deutsch**, the Government's only Site Agent (R. 167-204), said Report states:

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The president of the Chamber of Commerce decided not to give an opinion as to his preference.

The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, regards the government-owned site as an outstanding location but recommends the city park as first choice because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings. As a second choice, in the event that a trade with the city is not feasible, the postmaster prefers the present government-owned site" (R. 188, 189).

The **Deutsch Report and Recommendations** closes with this recommendation:

"For First Choice I recommend that the present Government-owned site be retained and that the adjoining property, Site 2 offered by **H. Bremermann**, be purchased for $15,000, and that a counter offer be made to the owner of Site 3, **Ella M. Drum**, to purchase this site for $600.

This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction" (R. 189).

3. Exchange of Property Is the Basis of This Suit and Required Dismissal of the Condemnation Petition.

Walter F. Meyers, Fourth Assistant Postmaster General, testified on behalf of the Government, in part, on examination by the Court, as follows:

"The Court: Did you reach your conclusion on the theory the City would convey title to this land?

A. Yes, sir; I read the cases that had been presented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something" (R. 131).

The Stipulation of Agreed Facts expressly recites that the authority of the city officials to enter into the agreement for an exchange of properties is based upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362, Revised Statutes of Missouri, 1939).

Item VI of the Stipulation of Agreed Facts reads, as follows:

> **"Item VI—Agreement to Exchange Property.**
> That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the old United States Post Office Building located in said City of Cape Girardeau, Missouri;
>
> That said City Officials claimed and represented that they based their authority to sell or dispose property upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 of the Revised Statutes of Missouri, 1939).
>
> That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 of the Revised Statutes of Missouri, 1939)" (R. 162, 163) (App. p. 7a).

The sections of the Missouri Statutes relied upon, as hereinabove referred to, read as follows:

> "Sec. 7361. **May Sell and Convey Commons.**—Where any city, town or village in this state hath a common annexed to it, the trustees or body corporate of said city, town or village shall have authority to sell or convey, by deed in fee simple, all the common annexed to said city, town or village (R. S. 1929, Sec. 7210).
>
> Sec. 7362. **May Pass Ordinance and Perform Other Acts Necessary to Effect Sale.**—The trustees, or body corporate, of said city, town or village, is hereby given full power and authority to pass any laws, by-laws, ordinance or other necessary provisions regulating and effecting the sale of said commons, or to perform, or cause to be performed, all acts that are, or may become, necessary to carry into full effect the sale of said commons by said city, town or village" (R. S. 1929, Sec. 7211).

Other evidence in the Record showing that the purpose of the condemnation proceedings was to effect an exchange of properties is set out and discussed in the argument.

4. The Record Shows That the Site Which Government Officers Selected Would Not Provide Suitable Accomodations for Court House, Post Office and Custom House as Required by Act of May 25, 1926, Cited and Relied Upon by Petitioner.

The Statute of May 25, 1926, which petitioner cites and relies upon as the Statute involved (U. S. Br. pp. 3, 12, 23, 37) was enacted, "To enable the Federal Works Administrator to provide suitable accommodations * * * for court houses, post offices, immigration stations, custom houses * * *," and the record in this case shows that the

land sought to be condemned would not "provide suitable accommodations" for the Federal court house, post office and custom house at Cape Girardeau, and the decision of the Circuit Court of Appeals was not only authorized but was required by the Statute and the undisputed facts in the Record.

The Government architect, **Hart**, on cross examination by counsel for petitioner, showed the lack of availability of the land in question when he testified:

> "Q. You made the statement a little while ago that all that would be left on the east side of the building would be terraces. Aren't all those terraces included in the Government acquisition down to Spanish Street?
>
> A. No, sir, the new property comes up to the terraces. The terraces are out beyond. The property lines come about to here. The terraces are down beyond that (indicating)" (R. 369).

It is conceded in this Record that the description of the land in question referred to by the witness **Hart**, is accurately described with respect to its elevation and boundaries as set out in the opinion by the District Judge (55 F. Supp. 555, 556), as follows:

> "The Park is bounded on the east by Spanish Street, which is 40 feet below the level of the proposed site. To go from Spanish Street to the proposed site it is necessary to ascend approximately 60 steps. The east line of the proposed building site is near the top step, leaving approximately 100 feet between the east line of the proposed site and the east line of the Park site. These strips of land thus remaining on the north, east and west outside of the boundary lines of the proposed site are not sought by plaintiff and are to remain Park property." (See United States Exhibit 11, R. 498, 499.)

The Report and Recommendations of **Deutsch** (the Government's only Site Agent) show the "disadvantages" of the particular land in question in the following language:

> "This location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it may be necessary to forego advantages, with respect to necessary approaches and driveways" (R. 177).

[redacted] particular land described in the petition with other sites, the Report and Recommendations of the Government's only Site Agent concludes:

> "It is my opinion that the present Government-owned site and adjoining ground is the most outstanding location in the city. Any of the other sites would be merely a compromise to avoid the demolition of the present federal building. While due regard must be given to public sentiment, it is obvious that the city park site, while it might provide an attractive setting, would present a problem to develop for practical utilization. The third choice would make a fairly suitable site, especially in the event that the present federal building would remain, but the lack of a bid from **Miss Greene** and the sentiment in her favor against condemnation is a serious obstacle" R. 185).

As to the site recommended by the Government's only Site Agent as "first choice," in preference to the particular land sought to be condemned, the Deutsch Report and Recommendation states:

> "This (present Post Office site) is an excellent

corner location facing the most prominent intersection in the city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three blocks east of what might be designated as the center of delivery and the approximate center of population. It is directly across the street from the bus depot, the largest office building in the town, and the two principal hotels which are convenient for sessions of the Federal Court.

The location is also conveniently situated with regard to the Southeast Missourian Publishing Company and the Missouri Utilities Company, two of the largest mailers in the city. Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing. The purchase price of the Bremermann property is reasonable, and the strip owned by Drum can no doubt be purchased for approximately $600" (R. 177-178).

The Record shows that the only investigation or consideration of the suitability of the land in question as an available, suitable and fitted site was the investigation and recommendation made by **M. J. Deutsch**, the Government's only Site Agent. Bearing on the selection and character of the land in question, we here call attention to the following undisputed evidence in this Record.

Walter Meyers, Fourth Assistant Postmaster General, testified, on cross examination, as follows:

"Q. Now was there any information assembled with respect to the selection of a site for the post office at Cape Girardeau after the suit had been reversed by the Circuit Court of Appeals in this proceeding?

A. Not that I know of" * * * (R. 136).

Mr. Meyers further testified:

"Q. And your files, to your knowledge, have no papers of any kind showing any action taken by **Postmaster-General Walker** in his capacity as Postmaster-General prior to the signing of this paper (Government Exhibit 4) on June 10, 1943? (R. 86.)

A. I think that is correct.

Q. And that is also true of **General Fleming?**

A. I don't know, but I assume so.

Q. Do you know whether there was any information furnished to the Postmaster-General or the Administrator of Public Works Agency, in the form of a plat showing the property sought to be condemned in this proceeding, before the architect, **H. A. Tucker,** visited Cape Girardeau?

A. I don't know.

Q. Do you know whether the original plan for the condemnation of a part of the Park and court house contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site" * * * (R. 137).

As hereinabove set out under Subdivision 3 of this statement, **Mr. Meyers** testified that his Committee reached its conclusion regarding the exchange of property on the theory the City would convey title to this land. The Government not only fails to consider but wholly ignores the Stipulation of Agreed Facts, Report and Recommendations of the Government's only Site Agent, and all other facts in this Record, which conclusively show that the site selected is not available, suitable and fitted for the Post Office site.

The Record clearly shows that **Fourth Assistant Postmaster-General Meyers** was mistaken in testifying that **Mr. M. J. Deutsch** was not the only Government Inspector

to make an examination of the sites at Cape Girardeau and recommendations to the Joint Committee.

On cross examination **Mr. Meyers** testified:

> "Q. Now the Government's only site investigator in this case was **Post Office Inspector M. J. Deutsch?**
> A. No, that is not correct. **Mr. Betterly** came out to go over this matter, **Mr. Witman** came out, and two architects came out to go over it" (R. 128).

Mr. J. F. Betterley, referred to by the Fourth Assistant Postmaster-General as one of the persons investigating the site, testified that he never at any time acted in the capacity of a Site Agent. Note the following question and answer by **Mr. Betterley** in this connection:

> "Q. And you made no record for the Committee?
> A. That is right" (R. 354).

The testimony of **E. R. Witman,** referred to in **Mr. Meyers'** testimony, showed that he was Fiscal Manage. and had nothing to do with the inspection of Post Office sites.

The Stipulation of Agreed Statement of Facts shows that **H. S. Roome** prepared the form of proposal for the exchange of properties, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for the Post Office (R. 163, 164). Item IX, Stipulation of Agreed Facts (App. pp. 8a, 9a).

The Stipulation of Agreed Facts further shows that **H. A. Tucker,** referred to by the Fourth Assistant Postmaster-General as making an investigation of the sites at Cape Girardeau, had no authority and was given no in-

structions to make investigation of sites at Cape Girardeau, and had no authority to make any recommendations to the Joint Committee regarding the selection of a site at Cape Girardeau, and in fact made none (R. 163). Item VIII, Stipulation of Agreed Facts (App. p. 8a).

The lack of information on the part of the agents of the Government regarding the physical facts at the Court House site is disclosed on the cross examination of **R. S. Hart** (one of the architects referred to by the Fourth Assistant Postmaster-General), as follows:

> "By **Mr. Hasson**, Attorney for the Department of Justice:
>
> Q. **Mr. Hart**, you stated your duties were to go down there and locate the building on the site that was to be secured for this particular site. Did you have anything to do with recommending the site for selection by the Postmaster-General and the Federal Works Administrator?
>
> A. No, sir."

5. Government's Only Site Agent Recommended Selection of a Different Site.

The Stipulation of Agreed Facts in this Record shows:

That Post Office Inspector, **M. J. Deutsch**, was designated as the Government's only Site Agent to visit the City of Cape Girardeau, for the purpose of investigating and recommending to the Joint Committee considering the selection of the Post Office, Custom House and Federal Court Building site at Cape Girardeau, an available, suitable and fitted site for the construction and maintenance of such building at Cape Girardeau.

That the said Post Office Inspector, **M. J. Deutsch**, did, after considering the facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House and Federal Court Building at Cape Girardeau, make a report to said Joint Committee wherein he, as the Government's only Site Agent, recommended as his First Choice a site other than the public property sought to be condemned (R. 158, 159). Item II (App. pp. 2-a, 3-a, 4-a).

Bearing upon the question of suitability of site in question, we here call attention to Report and Recommendations of the Government's only Site Agent hereinabove quoted from (ante pp. 12-13).

In the first opinion of the Circuit Court of Appeals, which was unanimous, the Court found in favor of this respondent and against the petitioner herein. On remand the District Court found in favor of this respondent and against petitioner herein. The petitioner appealed from that judgment and the Court below, in a unanimous opinion, affirmed the judgment of the District Court, and petitioner now asks this Court to review the undisputed facts in this Record for the fourth time.

ARGUMENT.

I.

The matters at issue in the within cause were correctly decided by the Circuit Court of Appeals when it affirmed the judgment of the District Court in favor of respondent and against the petitioner, on the ground that the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, Title 40 U. S. C. 341, under the record in this case, did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case by petitioner to condemn the particular land in question.

In referring to the basis of this suit, the Court below correctly stated the undisputed facts in this Record, as follows:

> "The evidence also established that, prior to the institution of the condemnation proceeding, certain agents of the Public Works Administrator and officers of Cape Girardeau had conceived the idea of an exchange of the park property for the present Federal building and the land on which it is situated, and that negotiations between them to that end had culminated in the proposed agreement between them for the exchange of property. As stated above, this proposed agreement was the moving cause for the selection of the park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. This exchange was to be consummated eventually by the

acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings. The facts set out above are sufficient, we think, to distinguish this case from **C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372,** and like decisions.

The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in **Oklahoma v. Atkinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. (2d) 636, 639.** For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, par. 301-303, effective July 1, 1939, 53 Stat. 1426, 1427; 40 U.S.C.A., par. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several States sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for post offices, court houses, and custom houses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions" (R. 662, 663) [151 F. (2d) 881, 883].

The Act of May 25, 1926, cited and relied upon by petitioner, provides, in part:

> "To enable the Federal Works Administrator to provide suitable accommodations * * *, court houses, post offices * * *, and other public buildings of the classes under the control of the Federal Works Agency in the states, territories and possessions of the United States, he is hereby authorized and directed to acquire by purchase, condemnation or otherwise, such sites and additions to sites as he may deem necessary * * *. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Federal Works Administrator to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quit claim deed of conveyance: * * *"

In referring to this Statute, under the undisputed facts in this case, the Circuit Court of Appeals said:

> "* * * The facts set out above (in the opinion) are sufficient, we think, to distinguish this case from **C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372,** and like decisions."

Continuing the reference to the lack of authority to condemn, under the Record in this case, the Court said:

> "The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in **Oklahoma v. Atkinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. (2d) 636, 639.** For the authority asserted in the present case the Govern-

ment relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, Secs. 301-303, effective July 1, 1939, 53 Stat. 1428, 1427; 40 U.S.C.A., Sec. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several states sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for post offices, court houses, and custom houses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions."

"If the Act relied on by the United States should be held to confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, it would subject the States and their political subdivisions to an interference with necessary local governmental functions at the decision of Federal administrative officials, with possible unfortunate and unnecessary conflicts between State and Federal authority. We find no basis in the Act relied on by the Government for attributing to Congress any such intent" (R. 663, 664). [151 F. (2d) 881, 883.]

II.

Petitioner abandons the theory upon which it tried this case in the courts below in its Petition for Writ of Certiorari filed herein, and we respectfully submit it is without merit and should be denied.

Respondent will here discuss the three questions presented in the Petition (Petition p. 2) in the order there set out.

The first question presented in the Petition for Writ of Certiorari reads as follows:

> "1. Whether, under the statute authorizing the Federal Works Administrator, acting jointly with the Postmaster General, to condemn for post offices such sites 'as he may deem necessary', a petition to condemn property already devoted to public use may properly be dismissed on the grounds that, in the opinion of the Court, the selected site is not necessary for the public project because other sites are available, condemnation of the selected site will interfere with local governmental functions, and the property is held in trust for the specific purpose to which the land is being devoted." (Note: This question is now Number II in Brief of Petitioner, U. S. Br. 2.)

This question ignores the Stipulation of Agreed Facts (R. 157, 160) (App. pp. 1a-11a).

The present public uses (referred to in Question 1 of the Petition) of proposed site are stated in the first opinion by the Circuit Court of Appeals in this case [135 F. (2d) 196, l. c. 198], which is the identical description of present public uses of proposed site found in the Stipulation of Agreed Facts (App. pp. 2a-4a). The Court below also set out a full description of the present public uses of the proposed site in its opinion in this case [151 F. (2d) 881-883] (R. 660, 661).

This question wholly disregards the facts that the law to be applied to the facts of this case is the law of the State of Missouri with respect to the power of the city to exchange or convey the property here involved.

> The Board of Regents for Normal School District No. 3 v. Painter, Appellant, 102 Mo. 464, 14 S. W. 938.

In The City of Defiance v. McGonigale, 150 Fed. 689, the Circuit Court of Appeals, Sixth Circuit, in referring to the opinion of the Supreme Court of Ohio, said:

> "Whether those views were correct or not we need not and should not inquire, inasmuch as the force and effect of an adjudication do not depend upon the soundness of the judgment rendered. This general and well settled proposition is referred to in **Case v. Beauregard, 101 U. S. 688, 25 L.Ed. 1004,** and in **Jeter v. Hewitt, 22 How. 352, 16 L.Ed. 345,** where it was stated that res adjudicata renders white that which is black. The opinion of the Ohio Supreme Court covered and expressed the views of that Court upon the litigation then before it, and we do not feel at liberty to disregard them in this case, especially as our notion of the merit of the objections of the city to paying for the water it used are quite in accord with what we concede to have been those of the Supreme Court of Ohio."

Let it be observed that the Circuit Court of Appeals in this case, **Carmack v. United States, 135 Fed. (2d) 196,** l. c. 199, said:

> "The Record shows wihout a dispute that the property has been devoted to public use not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

The second question presented by Petition (p. 2) reads as follows:

> "Whether, under the facts of this case and particularly in the light of the approval of local public officials and a majority of local voters, the selection as a site for a federal post office of property used for a city park and court house was arbitrary and capricious." (Note: This question is now Number III in Brief of Petition. U. S. Br. 2.)

In the second question presented, the petitioner takes the position that the proposed exchange of properties prohibited by Missouri law is not arbitrary and capricious in the light of the approval of local public officials and a majority of local voters. The District Court, in referring to the matter of local approval, said:

> "We note there was offered in evidence the proceedings leading up to and the holding of an election on the Park site. The evidence is of little value to the issues. Only one site was submitted to the voters and that was presented as a question of the City making the trade discussed heretofore. Such procedure could not give legal effect to a transaction the City was powerless to perform" (55 Fed. Supp. 555-563) (R. 600, 632).

Furthermore, the answer of respondent Carmack (R. 10) shows that respondent appeared for herself and other heirs similarly situated and the Record in this case reveals that there was a referendum petition signed by over 2,000 citizens of Cape Girardeau protesting against proposed exchange of property (R. 444), was ignored by the City Officials. These signers were in addition to the protest set out in the Deutsch Report and Recommendations.

The District Court, in referring to this matter, said:

> "* * * It is doubtful if any site is ever selected that is acceptable to all residents of any town or city. Certainly the evidence shows a very sharp division of opinion in Cape Girardeau on the selection of the site here under consideration. This has been the case from inception of the project and will, no doubt, continue to the end * * *" (55 Fed. Supp. 555, 563) (R. 600, 616).

This question is based upon the alleged approval of local public officials and an alleged election. The petitioner wholly ignores the following facts:

(1) Resolution of County Court of Cape Girardeau County protesting against disposiiton of court house park site and building (R. 462) (App. pp. 19a, 20a).

While it is true that the County Court of Cape Girardeau County undoubtedly recognized the fact that the title is held in trust, as declared by the Supreme Court of Missouri in the case of **Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938,** disclaiming any interest in the title to the real estate involved (R. 38), yet the County Court did protest against the disposition of the property in this proceeding as was its duty under the law as declared by the Supreme Court of Missouri in the Painter case. The resolution of the County Court protesting against this proceeding is printed in full in the Appendix (App. pp. 19a, 20a).

(2) This question wholly disregards the fact that respondent appeared in this proceeding in response to a summons and filed her answer for herself and others similarly situated (R. 10). The Record shows that there was a referendum petition signed by over 2,000 citizens of Cape Girardeau protesting against the proposed ac-

change of property (R. 444). This protest was ignored by the officials of the City of Cape Girardeau.

The third question presented by petitioner (p. 2) reads as follows:

> "Whether a taxpayer, property owner, and heir of the grantor to the city of the property sought to be condemned, has standing to object to the taking when she has no property interest in the land." (Note: This question is now Number I in Brief of Petitioner. U. S. Br. 2.)

In the third question thus presented as to the right of respondent to assert the defenses alleged in her answer, this matter was disposed of on the first appeal and accepted by petitioner and is not now properly a question before this Court **[Carmack v. United States, 135 F. (2d) 196, l. c. 199]**.

The position of petitioner with respect to the issues involved and the procedure adopted after remand is set forth in a letter from **Assistant Attorney General Littell**, to the United States Atorney at St. Louis, Missouri, dated July 23, 1943, in which **Mr. Littell**, among other things, said:

> "You are advised that the Solicitor General has decided that application should not be made for a Writ of Certiorari * * * (R. 94).
>
> It will be recalled that the Circuit Court of Appeals held that right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, but whether in carrying out the purpose of Congress the officer has acted capriciously or arbitrarily is a judicial question, and that this issue should have been determined by the District Court. This department feels that this issue should be raised by the defendant, testimony taken if the Court desires it, and the question decided by

the Court. It also appears to this department that the best evidence to offset the contention that the selection was arbitrary or capricious is the report made by **M. J. Deutsch**, dated August 20, 1940 * * *" (R. 94, 95).

Let it be observed that on the second trial of this cause in the District Court the theory of the petitioner as to the framing of the issues involved, and the taking of testimony, was adopted by the petitioner. The second trial was conducted in all respects as directed by the petitioner consistent with the first opinion of the Court of Appeals.

In the third question (page 2 of petition) presented as to the right of respondent **Carmack** to assert the defenses alleged in her answer, this matter was disposed of on the first appeal, and accepted by petitioner and is not before this Court.

> **Carmack v. United States, 135 F. (2d) 196, l. c. 199; Mott v. Morris, 249 Mo. 137, 155 S. W. 434, 438.**

In support of the respondent's above proposition we here call attention to the following authorities:

> "Questions presented by a petition for certiorari should not be answered where based upon a state of facts not presented by the instant case."
>
> **General Talking Pictures Corporation v. Western Electric Company, 305 U. S. 124, 125, 83 L.Ed. 81, 82 (Headnote 1).**

> "It is elementary that the Court is not bound to determine questions which have become academic."
>
> **Ford Motor Company v. National Labor Relations Board, 305 U. S. 364, 375, 83 L.Ed. 221, 230, 231.**

All proceedings on the second trial of this case after remand (R. 658) as stated in 151 F. (2d) 881, are consistent with the first opinion of the Circuit Court of Appeals, remanding this cause for further proceedings consistent with that opinion. **Carmack v. United States, 135 F. (2d) 196.** The petitioner accepted the Findings of Fact stated in the first opinion of the Circuit Court of Appeals. [135 F. (2d) 196], and also accepted the law governing the right of the Government to condemn the particular property described in the condemnation petition in the circumstances presented in this case as declared by the Court of Appeals on the first appeal [135 F. (2d) 196]. And petitioner proceeded with the second trial of this cause in the District Court after remand (R. 600-618) reported in 55 Fed. Supp. 555, in a way entirely consistent with said opinion [135 F. (2d) 196], reversing and remanding this cause for further proceedings.

II-a.

The specifications of errors to be urged by petitioner (P. 9) are merely a restatement of the questions presented, and are also void of merit. A discussion of the specifications of errors is merged in the discussion of the undisputed facts in this case and the law applicable thereto: We here call particular attention to the deed relied upon by petitioner; terms or expressions "common," "public square," and "park"; resolution of the city officials with respect to the offer to exchange properties; and also discuss the authorities relied upon by petitioner not applicable to the facts in this case.

(1) Facts ignored:

A. The deed of 1807 by **Louis Lorimier** to the District of Cape Girardeau (R. 99) referred to in the United States' Brief (U. S. Br. 5) designates the land dedicated as "common," a fact overlooked by petitioner. This deed has no bearing upon any of the issues in this case other than to show the intent of donor, **Louis Lorimier,** in his deed of 1807.

B. The deed relied upon by petitioner in this proceeding is the deed of 1820 executed by the heirs of **Louis Lorimier** to the inhabitants of the town of Cape Girardeau dedicating several tracts for particular public uses, including the one involved here (R. 106). This deed in dedicating the land sought to be condemned in this proceeding describes the land as "**the place known and designated in the plan of said town as the 'Public Square'** bounded * * *." The deed of 1820 further recites that "provided always that the several tracts or parcels of land thus granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property." The intent of donors is clearly apparent. They intended to dedicate the "Public Square."

C. The lands referred to in the Lorimier deed of 1807 as "common" and in the Lorimier deed of 1820 as "Public Square" is referred to in the report of **M. J. Deutsch,** the Government's only Site Agent, as the site, "known as the City Park Site." (R. 175). In other words, the land in question has always been referred to, since the date of the Loromier deed in 1820, as the public square or city park. The public officials, and all others who

testified in this proceeding, referred to the land in question as the city park. It is perfectly obvious from this record that the term or expression "common" used in the Loromier deed of 1807, the term "Public Square" used in the deed of 1820, and the term "park" used throughout this Record in referring to the land sought to be condemned, are, under the facts in this Record, treated as synonymous. (See, 39 A. J. Sec. 2, pp. 803, 804.)

Let it be observed that the Resolution by the city officials of the City of Cape Girardeau (R. 448) makes no mention or reference of any kind to the use of the property as a public square, common, or court house park. The offer to exchange, for reasons not disclosed in this Record, did not advise the government that the property in question was devoted to the public uses described in this Record. The language used in the opinion of the District Judge, bearing on this question, is significant. The District Judge (R. 603) said: "There is no evidence that either the Postmaster General or the Administrator of the Federal Works Agency were ever informed or even now know that the site selection that bears their signatures (U. S. Ex. 4) described land that is a public park or that the land was devoted to any public use—except for a 'library building.' As to the library building, they had no knowledge as to its being subject to removal on '30 days' notice'." (R. 603.) (55 F. Supp. 555, 557.)

(2) Law applicable to the facts in this case disregarded by petitioner.

A. The Missouri Courts' construction of the deed executed in 1820 by the Lorimier heirs dedicating the property in question is, under the decisions of this Court, binding on the federal courts. **Thompson v. Magnolia Co., 309 U. S. 478, 484.**

In the case of **Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487,** the Supreme Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to any state, whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."

In the case of **Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Amer. Decisions, p. 95, at p. 98,** the Court said:

> "In this State there are few ancient towns in which squares such as this, do not form part of the plan. They are generally located at the intersection of the streets; and are intended as sites for the erection of buildings for the use of the public, such as court-houses, market-houses, school-houses and churches; Sometimes they are designed for ornaments; and at others, they are intended for promotion of the health of the inhabitants, by admitting a free circulation of air. The squares as well as the streets, and for the same reason, are placed under the superintendence of the local authorities, who have full power to regulate them, so as more effectually to answer the purpose to which they have been dedicated.

Further on in said opinion, the Court said:

> "For although the city has a qualified property in the ground, yet the corporation is but a trustee of the public, for whose use and benefit the squares were left open. The enjoyment of them is free, as things of common right, to all the citizens of the

commonwealth; subject, however, as I before observed, to such regulations and restrictions affecting all as are not inconsistent with the grant."

In Lowe v. The Board of Commissioners of Howard County, 94 Ind. 553, the Court said:

"The term 'public square' has acquired a legal meaning and courts adopt that meaning in all cases where the term is not shown by the language with which it is associated to have a different signification. The public square of a county is property of a public nature, held for governmental or public purposes (citing authorities). The general rule is that the property of a public corporation held for governmental purposes cannot be sold under any legal process. Property of this description cannot be sold on execution."

Let it be observed that the Lorimier deed of 1820 relied upon by petitioner in this proceeding designates the property in question as "the place known and designated in the plan of said town, as the Public Square, bounded * * *." (R. 106.)

In the case of **Woodard v. City of Des Moines, 182 Ia. 1102, 165 N.W. 313,** the Court had under consideration Section 753 of the Code of that State which provided that the city should have the care, supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances. The Court said:

"It is true that the word 'park' or 'parks' is not found therein, but we think without doubt the same idea is to be found in the words 'public squares' and 'commons.' The word 'park' as applied to pleasure grounds and places or open spaces for public use, or

public recreation owned by towns and cities, is very largely one of quite modern usage, and until recent years such places were in popular speech spoken of as squares and commons, and it is quite clear that the quoted section of the Code is the source of both municipal authority and municipal obligation with respect to public parks. It will be noted that the legislature has classed them in the same section with highways, streets, avenues and alleys, and that the duty of the city as to the care of one is no less imperative than it is its duty with respect to the others."

In **City of Defiance v. McGonigale, 150 Fed. 689,** the Circuit Court of Appeals followed the law declared by the Ohio courts. The Court said:

"* * *. With the opinion of the Supreme Court of Ohio before us, what we do is to accept it and the judgment expressly based thereon as binding in this particular case, where the law of Ohio is in question, and, upon a principle analogous at least to that of res adjudicata to hold that the plaintiff in error is not at liberty at this late day under all the circumstances of this case to defeat the payment of the demand sued on by the third defense set up in the answer; and, as this is conclusive of the case, we affirm the judgment of the Circuit Court, with costs."

(3) Law relied upon by petitioner is not applicable to the facts in this case.

A. In the case of **Tyler v. Judges of Court of Registration, 179 U. S. 405,** cited and relied upon by the petitioner, the Court was considering a boundary line question. The question in that case was whether the proceedings under the state law provided for by statute deprived persons of their property without due process of law. The facts in the Tyler case, supra, are wholly different from the facts in the instant case, and what is said in that case has no application here.

In the case of **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251,** cited and relied upon by the petitioner, the Court was called upon to notice and rectify any error that may have occurred in the interlocutory proceedings, and, of course, what is said in the Hamilton-Brown Shoe Company case, supra, is clearly not in point for any purpose under the facts of the instant case.

In the case of **United States v. Miller, 317 U. S., 369,** cited and relied upon by the petitioner, the issue under consideration was merely a matter as to whether the rule of the state should be followed in arriving at a fair market value of land condemned by the United States Government; and what is said in the Miller case, supra, could not affect the questions presented by petitioner in the instant case.

In the case of **Benitez v. United States, 141 F. (2d) 943,** the Court was considering a proceeding commonly referred to as the farmer-debtor's petition, and upon a hearing in that case the Court held that the appellant was not a farmer and that the bankruptcy court had no jurisdiction to entertain the petition. The Court pointed out that the authorities "much relied upon by appellant, are not in point because there the petitioners under Section 75 were undoubtedly farmers entitled to the protection of the Act." The Benitez case is obviously not in point under the facts in the instant case.

Chouteau v. City of St. Louis, 331 Mo. 781, 55 S. W. (2d) 299, cited and relied upon by petitioner, is bottomed upon an Act of the Legislature of the State of Missouri passed on December 14, 1882. Under this special Act Chouteau and others conveyed certain property to the City of St. Louis for a courthouse site. The Court, in passing upon the rights of Chouteau and others under

the deed, executed under the special Act of the Legislature, said: "They (Chouteau and others) were dealing with the State under a Special Act of the Legislature of Missouri, the terms of which called for the conveyance of the fee." The Court points out that the grantors in the Chouteau case knew at the time they executed the deed that they were required by the Act to convey the property in fee simple under the terms of the Act.

III.

The decision of the Circuit Court of Appeals that under undisputed facts in this record, the Act of Congress relied on by the petitioner did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, is not in conflict with the decisions of any other Circuit Court of Appeals, nor with any decision of this Court.

There is no conflict between the decision in this case and **C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372,** and like decisions.

The petitioner contends that the decision of the Court below is in conflict with decisions of other Circuit Courts of Appeals and also in conflict with decisions of this Court governing the right of petitioner to condemn for a Post Office site the particular property involved in this case. The facts in those cases were entirely different from the facts in this case. It is necessary for respondent to call attention to the undisputed facts in this voluminous Record which show conclusively that an illegal and void agreement for the exchange of properties is the basis of this suit.

The reason or excuse for selecting the site described in the Government's Petition for Condemnation is not based upon the merits or advantages of the particular land selected, but is bottomed entirely upon an offer by the City Officials for an exchange of property (R. 162) (App. p. 7a).

The Court below in referring to this matter, among other things, said:

> "* * * As stated above, this proposed agreement (for an exchange of properties) was the moving cause for the selection of the Park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power, but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. This exchange was to be consummated eventually by the acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings." **[United States v. Carmack, 151 F. (2d) 881, 883]** (R. 662, 663.)

In referring to the authorities relied upon by petitioner in the Court below and in this Court, the Court of Appeals said:

> "* * * The facts set out above are sufficient, we think, to distinguish this case from **C. M. Patten and Co. v. United States, 9 Cir., 61 F (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372**, and like decisions.
>
> The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in **Oklahoma v. At-**

kinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. (2d) 636, 639. For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, par. 301-303, effective July 1, 1939, 53 Stat. 1426, 1427; 40 U. S. C. A., Sec. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise * * *. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of building * * *, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions." **[United States v. Carmack, 151 F. (2d) 881, 883]** (R. 663, 664).

The **first step** in this proceeding was the letter dated November 26, 1940, from the Mayor of the City of Cape Girardeau, to the Commissioner of Public Buildings, Federal Works Agency, Washington, D. C., submitting a proposition for an exchange of the property involved in this proceeding for the present Post Office and Federal Court Building in the City of Cape Girardeau. (R. 76.)

The **second step** in this proceeding was a letter from **Neal A. Melick**, Acting Administrator of Public Buildings, Washington, D. C., dated May 26, 1941, accepting the proposition of the City of November 26, 1940, for an exchange of the property in controversy for the present Federal Building and site. (R. 63.)

The **third step** was a letter from **John N. Edy**, Acting Administrator, dated September 25, 1941, requesting the Attorney General to institute proceedings for the condemnation of the particular land, stating, among other things, that:

> "Under authority of the above cited legislation this Agency entered into a contract with the City of Cape Girardeau, Missouri, for the exchange of the present Federal Building and site, hereinafter described, for a tract of land as a new Post Office and Custom House site also hereinafter described." (R. 58.)

In referring to said letter signed by **John N. Edy**, Acting Administrator, **Paul Emmert**, Assistant General Counsel, Federal Works Administration, said:

> "He **(John N. Edy)** acted as indicated, that day he just happened to be the Acting Administrator that day and signed whatever papers were put on his desk for signature. **Mr. Edy**, in addition to his other duties acted as Administrator in the absence of the Administrator at that time." (R. 290.)

The **fourth step** was the letter from the Attorney General to the United States Attorney at St. Louis, dated October 16, 1941, which states that:

> "It is contemplated that compensation for the taking of the land shall be made by conveyance of the present federal building to the City of Cape Girardeau." * * * (R. 92.)

Walter F. Meyers, Fourth Assistant Postmaster-General, testified in the District Court, in part, on examination by the Court, as follows:

> "**The Court: Did you reach your conclusion on the theory the City would convey title to this land?**
>
> "A. **Yes**, sir; I read the cases that had been pre-

sented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something." (R. 131.)

In this connection it should be borne in mind that neither the City Officials nor the Government Agents in their negotiations for an exchange of property contemplated the destruction of the Public Library building, which petitioner now concedes must be removed by the city on thirty days' notice. (Letter of Acting Commissioner of Public Buildings. [R. 63.] See also Appendix, 5-a). In referring to this matter, the Fourth Assistant Postmaster-General testified, in part, as follows:

"Q. Do you know whether the original plan for the condemnation of a part of the Park and court house contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site." (R. 137.)

The Record further discloses the fact that the architects in their report complained that the Public Library Building would detract from the new building proposed to be erected on the land in controversy. But in writing the contract for an exchange of properties a description of the real estate to be acquired included the land on which the Public Library Building is located. The plats of the petitioner show that that land was included. (R. 77, 89, 499.)

In the light of the above facts we desire to call attention to the fact that the petitioner in its Brief at page 15 cites **United States v. City of Tiffin, 190 Fed. 279 (C.C.N.D. Ohio)**, in support of the petitioner's statement that:

"The decision in the instant case stands alone in

requiring specific Congressional authorization to condemn property already devoted to some public use when, in the Court's opinion, the taking is not necessary, and in thus unnecessarily burdening the exercise of the sovereign power."

In the City of Tiffin case, supra, the Government sought to condemn a portion of a public alley for a post office site. The Court, at page 280, said:

"The United States has paramount authority in the matter of taking any property within its borders for those public uses which are within the constitutional reservations to the general government."

But the Court further stated in the same paragraph, a principle overlooked by the petitioner, as follows:

"This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides with the courts." (Emphasis ours.)

In that case the trial Court was ruling on a demurrer to the petition. The concluding paragraph of the Opinion (190 Fed., loc. cit. 282) is as follows:

"We believe that all there is in this case is for a determination by judicial consideration of the comparative importance of the contending public uses involving this plot of ground **[In re Certain Land in Lawrence (D. C.), 119 Fed. 453]**, and that the demurrer should be overruled with exceptions."

In the Lawrence case, the Court (119 Fed., loc. cit. 456) said:

"The legislature is the sufficient judge of the relative importance of the two uses. If there is no express legislative provision, the relative importance of the two uses is to be determined by the Court. If the later use is deemed by the Court, under all the cir-

cumstances, to be more important than the earlier, the land is taken for the later use without compensation for the loss of the earlier. If the earlier use is deemed the more important, the later is forbidden and the earlier continues.

We come next to the application of these principles to the facts of this case. There is here no express provision of the statute. I do not believe that the United States could, at its will, build this post office in the middle of the principal street of Lawrence or across the main line of an important railroad * * *. I doubt if it can be laid down, without qualification, that the public use of a post office is in all places superior to the public use of a park. That it is so in the case at bar appears probable from what appeared incidentally at the argument, but the issue was not then raised, and cannot be determined without further hearing, if the City desires to be heard."

In re Certain Lands in Lawrence, 119 F. 453, l. c. 466.

The petitioner also on page 17 says, "Arbitrary or capricious means in bad faith or according to one's own will or pleasure, without adequate determining principle," and in a note cities several cases in support. **Fox Film Corporation v. Trumbull, 7 F. (2d) 715, 727,** does not even remotely hold or imply that "arbitrary or capacious means in bad faith." The Court in that case did, however, state a principle directly applicable and significant (page 728), as follows:

"If the commissioner * * * abuses his discretion, and acts in an arbitrary and capricious manner, and contrary to the plain intent of the statute, there remains the right to appeal to the courts which exists under the general principles of jurisprudence. As was said in **Bradley v. Richmond, 227 U. S. 477, 483, 33 S. Ct. 318, 320, 57 L. Ed. 603, 'there would, under gen-**

> **eral principles of jurisprudence, remain the right to judicial review if the result should violate either a right secured under the law of the state or that of the United States'." (Emphasis added.)**

The Court below said there is no conflict between C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 270, and like decisions. In referring to the inherent right of the Government to condemn, the Court, in the C. M. Patten and Co. case, supra, at page 972, said:

> **"However, this right of the Federal Government to condemn is subject to the power of the courts to intervene and prevent arbitrary and unnecessary action which must be determined by the facts in each particular case." (Emphasis added.)**

In referring to the facts in the Patten case, the Court in that case further said:

> **"Recognizing, therefore, the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the Government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved." * * * (Emphasis added.)**

The Court, in the Patten case, referring to the site involved in that case, further said:

> **"The site involved possesses special and superior advantages as regards the government departments and the general public which no other available site affords,** as it is surrounded on three sides by public streets and on one side by a public park, and is a conspicuous site along the harbor channel in full view and touch with the harbor activities, enabling those concerned with government inspection of other governmental departments to gain prompt and convenient access to the federal building, such as immigra-

tion, quarantine, steamboat inspection, and customs. It is nearer the railway passenger station, street car and interurban lines, and the close railway tracks paralleling the plaza affords opportunity for the installation of a conveyor system by means of a subway and tunnel to transfer the mails to and from the railway mail cars and the post office, which is a saving in time and expense. **There appear other advantages near the seat of operation which the site has in the way of location as regards both governmental departments and the general public which are more necessary and a greater public use than a small part of a plaza.** This conclusion was reached by the trial court and is sustained by the weight of the evidence." (Emphasis added.)

In referring to the site sought to be condemned in this case, the District Court (55 Fed. Supp. 562) (R. 615) said:

> **"Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The city has given bond to remove by wrecking or otherwise, the present Common Pleas Court House, where court is held; the building is also used for the city government. Certainly during the course of construction of the new buildings, judicial administration will be affected. There appears to be no definite arrangements for the Court of Common Pleas insofar as this Record is concerned. There is no suggestion for the future of the public library and the building in which it is located—other than removal of the building 'on thirty days notice'. There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff."** (Emphasis added.)

The Courts below properly found that the facts in this Record are sufficient to distinguish this case from the cases relied on by counsel for the petitioner.

IV.

The Record supports the finding of the District Court that the Administrator of Federal Works Agency and the Postmaster-General acted arbitrarily and capriciously in selecting the proposed site.

It is conceded in this Record that no joint selection of the site in question had been made prior to the filing of the original Petition in Condemnation in this case. As a matter of fact, the Record discloses that no joint selection was made until after the Court of Appeals reversed and remanded the cause on the first appeal. **Carmack v. United States, 135 F. (2d) 196.** In referring to this matter, the District Court said:

> "* * * Since the decision of the Court of Appeals, holding that proof of joint selection was a jurisdictional fact, the two public officers referred to have executed a site selection of the land described in the petition.
>
> **"There is no evidence that either the Postmaster General or the Administrator of the Federal Works Agency were ever informed or even now know that the site selection that bears their signatures (U. S. Ex. 4) describes land that is a public park or that the land was devoted to any public use—except for a 'library building'. As to the library building, they had no knowledge as to its being subject to removal on thirty days' notice" (United States v. Certain Land, 55 Fed. Supp. 555, l. c. 557) (R. 603).** (Emphasis added.)

In **United States v. 43,355 Square Feet of Land, 51 F. Supp. 905,** in deciding that the property had been capriciously and arbitrarily selected, the Court said (loc. cit. page 909):

"In making these observations and stating these

findings and conclusions the Court does not say or imply that any particular officer of the Government or any particular military man has gone out with a deliberate attempt to act facetiously with respect to the public generally. So far as I know each inspector and appraiser of this property may have done every act that he did in response to the order of some superior located in some other place.

The Court's conclusions relate to the situation as a **matter of law, not** as a matter of any express design going **to the question of proper, lawful or other kind of motives** of the particular official or military man who may have made an appraisal or an inspection or a report." (Emphasis added.)

At page 909 of the opinion in that case (51 F. Supp. 905) referring to the opinion of the Court in the Carmack case, supra [135 F. (2d) 196], the Court said:

"(9) This Court believes that the opinion of the Eighth Circuit Court of Appeals in that case applies to the situation in the case before the Court here, where the Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Powers Act, 50 U.S.C.A. Appendix Section 631 et seq., there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials."

In **Baisden v. Floyd County Board of Education, 270 Ky. 839, 110 S. W. (2d) 671, loc. cit. 673**, the Court, in referring to the duty to inquire as to whether the act of a Board was arbitrary, said:

"While this Court cannot question the motives of the Board in removing one who is delinquent in his

statutory duties (Board of Education v. Stephens, supra), we can and will upon review inquire as to whether the act of the Board was arbitrary; we may determine what was right and equitable under the circumstances; whether the act was directed by reason and in good conscience. **Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S. W. (2d) 356.** In its legal significance an act is arbitrary when it is done in an arbitrary or capricious way; without adequate determining prinpicle; not founded in the nature of things. **King v. Falls County (Tex. Civ. App.) 42 S. W. (2d) 481.** When we come to consider the action of the Board in removing appellant, we are forced to the conclusion that the removal was not based on sound reason or in the exercise of good judgment; it was neither right nor equitable, since we conclude that the reasons set forth in the affidavit and petition measure up to our idea of 'satisfactory' reasons for appellant's non-attendance at the three meetings."

Respondent believes that this Court will give consideration to State Court decisions for in **New York Rapid Transit Corp. v. City of New York, 303 U. S., 573, loc. cit. 593,** in referring to the matter of construing a contract, the Court said:

> "But, of course, in so doing we 'lean toward agreement with the courts of the State, and accept their judgments as to such matters unless manifestly wrong.'"

The District Court (R. 610) in discussing the position now taken by petitioner in this case (55 Fed. Supp., loc. cit. 560), said:

> "3. We conclude from this record that the plaintiff (petitioner herein) **concedes** in this case that the selection of the site described in the petition, **'was on the basis of exchange of the present Federal Building**

and site thereof' for the city park site described in the petition, **as the result of the agreement between the city officials and the plaintiff.** In doing this did the Joint Committee base their act on a false premise, namely: a mistake of law; the law governing the right of the city to sell or exchange the whole or any part of the park site?" (Emphasis added.)

The Court there quotes Item VI. of the Agreed Statement of Facts, the agreement to exchange property (R. 162) (App. p. 7a).

Again, at page 561 of the Opinion (55 Fed. Supp. 555, 568), the District Court (R. 613) said:

"We believe the action of the Joint Committee, in the proceeding under a mistake of law, is decisive of this case adverse to the plaintiff, but we do not base our holding on that point alone.

The cause must be considered under those rules of law applying to condemnation proceedings under a general act, which does not specify any certain property shall be condemned * * *."

The District Court (R. 615) also said: "Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The city has given bond to remove by wrecking or otherwise, the present common pleas court house, where Court is held; the building is also used for the city government. Certainly during the course of construction of the new building, judicial administration will be affected. There appears to be no definite arrangements for the Court of Common Pleas in so far as this record is concerned. There is no suggestion for the future of the public library and the building in which it is located—other than removal of the building 'on thirty days' notice.' There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff.* * *

Nowhere in the record do we find any claim by plaintiff that the site proposed is the only available property, reasonably fitted for the public project, or that failure to secure it would result in failure of the project.

Upon the record this Court cannot find that the site described in the complaint is the only available property, reasonably fitted for the public project, when the plaintiff's own representative, chosen because of his knowledge and ability to select sites, has placed another site superior in desirability to the site sought. With this admission of plaintiff's representative this Court cannot find that the failure to secure the site described in the petition would result in failure of the public project. These facts support defendant's position in this case. Nor was there the slightest effort made in this case by the plaintiff to show a necessity for taking the particular property here involved, already devoted to a public purpose. On the contrary the evidence is undisputed and comes from an unimpeachable source, the government's witnesses, that there is no necessity for taking the particular property described in the petition. That another location is preferable is an unchallenged fact in this case. Consequently there can be no necessity by implication. Plaintiff proceeding under a general act, its case must fail for that reason also.

The plaintiff is content, or rather forced to be, to rest its case solely upon the right of the city to sell or trade the park property, coupled with the rule that selection of the site by authorized officers carries an assumption that the decision was based on facts justifying the action taken, until the contrary be shown. The contrary has been shown in this case." (Emphasis added.)

With respect to the contention of petitioner that the Courts below passed upon the question of the good faith of the parties, we here call attention to the language of

the District Court bearing on this question at page 563 in this case, **United States v. Certain Lands, etc., 55 Fed. Supp., 555, 563.** (R. 617.):

> "* * * The city officials of Cape Girardeau, no doubt acting in perfect good faith, represented to plaintiff or the Joint Committee on site selection, that the city had a legal right to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and the Joint Committee 'relied' upon the representations of the Cape Girardeau city officials as to their legal right to sell or exchange the park site, and the Joint Committee so relying, 'based' their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau being without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange."

The District Court then cited the case of Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S.Ct. 364, 81 L.Ed. 510, where this Court, at page 69 of said Opinion, held:

> "It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise. * * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property."

The Circuit Court of Appeals, after reciting the facts in this Record, said:

"As stated above, this proposed agreement (agreement for an exchange of properties) was the moving cause of the selection of the Park as the site for the Federal Building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the property, **the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made." [United States v. Carmack, 151 F. (2d) 881, 883.]** (R. 662.) (Emphasis added.)

V.

The City of Cape Girardeau Has No Authority to Contract to Convey Land Involved.

To show that the invalidity of the purported agreement is vital and very important in this case, we call the Court's attention to a case wherein the City of Kennett, Missouri, executed a contract with the United States which it had no authority to make under the laws of the State of Missouri, **Ark.-Mo. Power Co. v. City of Kennett, Mo., 78 F. (2d) 911.** In discussing the right of the defendant in that case to have a contract declared void, the Court made the following statement (l. c. 922):

"Revised Statutes of Missouri 1929, Sec. 2962 (now Revised Statutes of Missouri 1939, Sec. 3349), provides that no * * * city * * * or other municipal corporation shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law * * *. The City derives none of its powers from the United States. It is a creature of the State of Missouri and has only such powers as the state has given it. The relation of the United States to the City is no different than would

be the relation to it of any individual, corporation, foreign state or foreign sovereignty which had made a similar arrangement for financing the City with respect to the construction of public works. If the City could lawfully enter into this agreement with the United States, we think it could lawfully have entered into a similar agreement with any entity having power to contract."

Under the law as declared by the Supreme Court of Missouri, the alleged agreement between the officers of the United States and the officials of the City of Cape Girardeau offered in evidence in this case is worthless.

Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464; 14 S. W. 938.

American Jurisprudence, Volume 18, Section 126, p. 749, states the rule applicable to the facts in this case, as follows:

"A municipal corporation cannot without express authority from the Legislature sell property which it holds for the use and benefit of the public at large."

The Record in this case fully supports the finding of the District Court that the Government officials, in ignoring the decision of the Supreme Court of Missouri in the Painter case, supra, and the rule just stated acted arbitrarily without reasonable regard for the interests of the public at large and especially of the City and County of Cape Girardeau, and that the determination to select the Court House Park as a site for the new Post Office was made without considering the facts and without reference to the information which the investigation, report and recommendations made by the Government's only Site Agent so fully and clearly disclosed.

We believe it has been sufficiently shown by what has already been said herein that the law of the State of Missouri as stated in the Painter case, supra, is the law by which this case was rightly decided by the courts below, and that the action of the Government officers in wholly ignoring the decision in that case is arbitrary, capricious and unreasonable.

We call attention to a few of the decisions of the Courts of the United States which hold that the law of the State should be recognized and followed.

In **Guy v. Utrecht, Warden, 144 F. (2d) 913, l. c. 915,** the Court said:

> "The highest court of a state is the final arbiter of what the state law is, and when that court has spoken, its decision must be accepted by the federal courts as defining the law of the state. **West v. American Telephone & Telegraph Co., 311 U. S. 223, 236, 61 S. Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956; Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 U. S. 103, 107, 59 S. Ct. 420, 83 L.Ed. 515; Herzog v. Colpoys, App. D. C. 143 F. (2d) 137, 138.**"

In **Krauss v. Greenbarg, 137 F. (2d) 569,** the Court of Appeals, Third Circuit, at page 571, said:

> "However, as this Court has said many times since **Erie Railroad Co. vs. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487,** our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits."

In **Charles Payton West and Maurice John West v. American Telephone and Telegraph Co., 311 U. S. 223, l. c. 236, 237,** the Court said:

> "* * * the state 'laws' which, by Sec. 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, chap. 20, 28 U.S.

C.A., Sec. 725, are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right. See **Russell v. Todd, 309 U. S. 280, 289, 84 L.Ed. 754, 761, 60 S. Ct. 527.** And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute. **Erie R. Co. v. Tompkins, supra (304 U. S. 78, 82 L.Ed. 1194, 58 S. Ct. 817, 114 A.L.R. 1487).** True, as was intimated in the Erie R. Co. Case (304 U. S. 78), the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See **Wichita Royalty Co. v. City Nat. Bank, 306 U. S. 103, 107, 83 L.Ed. 515, 517, 59 S. Ct. 420.** But the obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken."

In **Palmer v. Hoffman, 318 U. S. 109, l. c. 118,** the Court said:

"Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, settles the question of Missouri law prohibiting the City Officials from entering into an agreement with the agents of the Government for an exchange of property. That opinion is printed in the Appendix, pages 12a-18a.

VI.

The rule is also well settled that if the decision of the lower courts was correct the petition for writ of certiorari should be denied, even though the Court below may have based its ruling upon a wrong ground or had not based its ruling on all the facts in the Record which would have justified additional grounds for the decision.

In **North American Acc. Ins. Co. v. Tebbs, 10 Cir., 107 F. (2d) 853, l. c. 856,** the Court of Appeals held:

> "The trial court reached a correct result. The fact that he gave erroneous reasons therefor is immaterial. In the review of judicial proceedings if a decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In **Helvering v. Gowran, 302 U. S. 238, l. c. 245,** the Court said:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In **Reconstruction Finance Corporation v. Goldberg, 143 F. (2d) 752, l. c. 756,** the Court said:

> "Furthermore, even though the Court had relied upon a wrong ground for its judgment, it must be affirmed if correct. **Helvering v. Gowran, 302 U. S. 238, 245, 58 S. Ct. 154, 82 L.Ed. 224; LeTulle v. Schofield, 308 U. S. 415, 421, 60 S. Ct. 313, 84 L.Ed. 355.**"

In **Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium, 145 F. (2d) 661, l. c. 663,** the Court said:

> "The findings positively and definitely decide

against plaintiff all fact issues tendered on the trial, and they fully support the conclusions of law. It is appellant's burden, therefore, to show us that these are clearly erroneous."

In **Westchester County Park Commission v. United States, 143 F. (2d) 688, l. c. 694, 695,** the Court said:

"These rulings, to be sure, occurred in cases not involving condemnation; but that would seem to be a distinction without significance. Even, however, should we disregard those rulings, we would nevertheless conclude that there was no prejudice here. For, as under Rule 81 (a) (7), 28 U.S.C.A., following Section 723c, the new rules of procedure are applicable to appeals in condemnation cases, we must, under Rule 43 (a), apply the more generous rule of evidence; therefore, the federal 'harmless error' statute (28 U.S.C.A. Sec. 391) governs; under that statute the admission of the testimony was surely harmless. **Cf. United States v. Miller, 317 U. S. 369, 375, 63 S. Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55.**

(17) 5. Nothing is left to this appeal but, in effect, a request to us to conduct a trial de novo. This we cannot do. The trial court's determination of the facts must stand unless it is unsupported by substantial evidence. We see no warrant for reversal on that score."

VII.

Government's authority to dispose of present Post Office Building and Site is restricted by Acts of Congress.

It is apparent from the facts in the Record now under consideration that the Government is not auhorized by Section 341 or Section 345b of Title 40 U.S.C., or any other statute to exchange the present Post Office Building and site at Cape Girardeau for the land described in the Condemnation Petition already devoted to public use.

There is no claim by petitioner that the government-owned building and site has been supplanted by a new structure, or that the Secretary of the Treasury has determined there is no further federal need for the present government-owned building and site.

Section 345b, Title 40, provides the only method for disposing of existing federal buildings and it applies only in cases where existing buildings have been supplanted by new structures.

The alleged agreement for such an exchange of property is unauthorized, illegal and void and cannot be effectuated under the guise of a condemnation suit.

Furthermore, it is evident that in the selection of the site in this case, the administrative agents gave no consideration "to the interest and convenience of the public," as requred by Section 254, Title 40, U. S. Code.

VIII.

Petitioner misconceives the effect of the decision of the courts below.

Petitioner (Petition, p. 22, last paragraph) states that "the decision below would seem to require specific selection, by Act of Congress, of each site already put to a public use. Unless Congress is to be left in doubt as to what language, if any, is necessary or will serve to avoid this obviously impractical construction, review by this Court would seem to be essential." The petitioner's criticism of the decisions of the courts below is wholly unwarranted, under the undisputed facts in this Record. The facts are that the courts below followed the unbroken

line of authorities authorizing the courts to review the action of administrative officials in the circumstances here presented.

In order to show that petitioner has misconceived the decision of the courts below, we here quote from the opinion of the District Court (55 F. Supp. 555, 563) (R. 617) showing that the position of petitioner is unfounded. The Court said:

> "Certain conclusions suggest themselves which should be stated. This is not a case, in fact, where the representatives of the plaintiff have gone to the city of Cape Girardeau and designated the most imposing tract of ground in the city from a landscape viewpoint and which is now used as a public park, for the site of the new Federal building. And this notwithstanding the site is not in the trend of business nor accessible except from one street. That while the plaintiff will not take all the park, it will take a sufficient part of the park to destroy its usefulness as a park. That the plaintiff has proceeded to issue an order for the destruction of the public buildings on the site, buildings in which necessary public business is now transacted, including the Court of Common Pleas, Departments of City Government and the storage of valuable records, and granted to another building in which a public library is housed 'thirty days' to vacate. That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites which shows unquestionably that the action of the plaintiff is unnecessary and the site selected is not now, nor was it when selected, the most desirable and available. If this were the cold record, we believe few would question the conclusion that such action by the Joint Committee was arbitrary and unnecessary.
>
> Nevertheless the conclusions, as outlined above,

are present as a matter of law on the record in this case. The evidence shows that plaintiff was caused to take action which leads to the same results as outlined above, by virtue of the solicitation and entreaty of the city officials of Cape Girardeau, which solicitation crystalized in an agreement between the city officials of the city of Cape Girardeau and the Government officials to trade the park site (described in the petition) for the present Federal building. The city officials of Cape Girardeau, no doubt acting in perfect good faith represented to plaintiff or the Joint Committee on site selection, that the city had a legal right to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and the Joint Committee 'relied' upon the representations of the Cape Girardeau city officials as to their legal right to sell or exchange the park site, and the Joint Committee so relying, 'based' their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau being without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange.

In the case of **Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S. Ct. 364, 81 L.Ed. 510,** the Supreme Court had before it the question of legality of a gas proration order issued by the Railway Commission of Texas, ostensibly for the purpose, among others, of preventing the waste of gas. We think what the Court said with respect to the presumption of the existence of facts justifying the specific exercise of the power there under consideration, applies to the selection of a site for a post office made by and under authority of those agents of the Gov-

ernment to whom such duty has been delegated. Referring to the order in the Thompson case, the Court said, 300 U. S. loc. cit. 69, 57 S. Ct. loc. cit. 371, 81 L.Ed. 510: 'It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise. * * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property.'

A consideration of all the facts justifies the conclusion that defendant (respondent herein) has sustained the burden of proof placed upon her; that the selection of the site described in the petition, under all the facts referred to, amounts in law to an arbitrary and unnecessary act. Plaintiff's second amended petition will be dismissed."

The above quoted language clearly shows that the contention of petitioner (Petition p. 17) that arbitrary or capricious means "bad faith" has no application to the decisions of the courts below, under the undisputed facts in this Record. The courts below expressly held that the question of bad faith did not enter into the consideration of the facts bearing upon the question of arbitrary or capricious action of the administrative agents.

Petitioner asks this Court to grant a writ of certiorari on the grounds that the decision in this case is in conflict with the decision in the C. M. Patten and Company case, whereas an examination of the Patten case discloses that this case is not in conflict with the decision in the Patten case under the conceded facts in this record, but, on the contrary, is in exact accord and harmony with the Patten case.

C. M. Patten and Company v. United States, 9 Cir., 61 F. (2d) 970 (erroneously stated as page 920 in the Opinion

of the Court of Appeals [R. 663]), quotes from **United States v. City of Tiffin, 190 F. 279, 280,** including the following:

> "This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides in the courts."

The Court [61 F. (2d) l. c. 972] then says:

> "However, this right of the federal government to condemn is subject to the power of courts to intervene and prevent arbitrary and unnecessary action, which must be determined by the facts in each particular case."

The Court (page 972) also says:

> "Recognizing therefore the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved."

The Court (p. 972) then stated the advantages in the selection of the site and said:

> "This conclusion was reached by the trial court and is sustained by the weight of the evidence."

The decision of the Circuit Court of Appeals was correct and is not subject to review when, in approving the findings of the District Court, based upon the evidence in this Record, it said:

> "We cannot say that any of these findings of fact by the District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence." (R. 661, 662.) **United States v. Carmack, 151 F. (2d) 881, 882.**

It is conclusively shown from the evidence in this case that the present proceedings for condemnation of the courthouse park site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. [151 F. (2d) 881, l. c. 883.] It also appears in this Record that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property: **Carmack v. United States, 151 F. (2d) 881; Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938; Mott v. Morris, 249 Mo. 137, 155 S. W. 434.**

The same authorities cited and relied upon by petitioner in this Court are the identical authorities relied upon by petitioner in the courts below. And in this case, the lower court said that the facts in this Record are sufficient to distinguish this case from **C. M. Patten & Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 F. Supp. 372,** and like decisions.

Counsel for petitioner have not cited any authority justifying the attempt of the city officials of the City of Cape Girardeau to barter and exchange properties under the conceded facts in this case and, in our opinion, none can be found. The entire contention of counsel for petitioner is bottomed upon academic discussion of cases and statutes applicable to the power and authority of the United States to condemn property already devoted to public use under the facts and circumstances set out in the cases cited.

To illustrate, the Court, in the Patten case, said:

> **'Recognizing, therefore, the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved."**

We have set out (ante. p. 42) what the Court said in the Patten case with respect to the evidence as to the advantages of the site selected. The right of the government to review is unquestioned in any of the authorities and each case must be determined upon its own facts.

Further in the Patten case the Court quoted with approval the following statement of the law bearing on the question of necessity: "However, this right of the federal government to condemn is subject to the power of the courts to intervene and prevent arbitrary and unnecessary action, which must be determined by the facts in each particular case."

In the case under consideration the facts in this Record are, as stated by the lower courts, sufficient to distinguish this case from the cases relied on by counsel for petitioner.

CONCLUSION.

The respondent, by reason of the facts in the Record and the applicable principles of law, believes that the judgment of the court below should be affirmed, and respectfully asks that the Court will so order.

Respectfully submitted,

HOMER HALL,
509 Olive Street, St. Louis 1, Mo.,
ROBT. D. ABBOTT,
506 Olive Street, St. Louis 1, Mo.,
I. R. KELSO,
First National Bank Bldg., Cape Girardeau, Mo.,
L. LEE BOWMAN,
H. & H. Bldg., Cape Girardeau, Mo.,
Counsel for Respondent.

APPENDIX.

(The formal style of case omitted here.)

Washington, D. C.
Tuesday, November 9, 1943.

Stipulation Between the Plaintiff, United States of America, and Defendant, Iska W. Carmack, Regarding an Agreed Statement of Facts to be Read in Evidence on the Part of the Defendant, Iska W. Carmack, in the Above-Entitled Cause.

Without limiting either the right of the defendant, Iska W. Carmack, to take depositions in the above entitled cause, or the scope of the inquiry in the above entitled cause, it is agreed between the plaintiff, United States of America, and Iska W. Carmack, one of the defendants in the above-entitled cause, as follows:

Item I. Agreed Statements of Facts.

That the United States of America, plaintiff, and Iska W. Carmack, one of the defendants in the above-entitled case, admit the statements of facts hereinafter set out, and agree that said statements of facts shall be read in evidence on behalf of the said defendant, Iska W. Carmack, on the trial of a certain cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482 (Condemnation Suit) wherein the said United States of America is plaintiff and the said Iska W. Carmack, is one of the defendants;

That said statements of facts hereinafter set out shall be received in evidence on the trial of said cause, as aforesaid, as agreed statements of facts;

That this stipulation, signed by the parties hereto, shall be filed with the shorthand reporter, spread upon the record, and annexed to the certificate of the said shorthand reporter to be sworn to before a notary public in accordance with certain stipulations between the parties hereto, signed by said parties and filed with the said shorthand reporter, on the ninth day of November, A. D., 1943, and spread upon the record by agreement between said parties hereto, on said ninth day of November, A. D., 1943.

Item II. Description of the Property.

That it is agreed by and between the parties hereto that the property sought to be condemned in the above entitled cause by the United States of America, plaintiff herein, as the site for the construction and maintenance of a Post Office, Custom House, and Federal Court building at Cape Girardeau, Missouri, is located in the town (now City) of Cape Girardeau, Missouri, in the Eastern Judicial District of Missouri, Southeastern Division.

It is further agreed that the property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation, filed in the above-entitled cause, is now and has been for many years, devoted to public purposes (the Common Pleas Court House, City Offices, Public Library, and Public Park);

That Post Office Inspector M. J. Deutsch was designated as the Government's only Site Agent to visit said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, for the purpose of investigating and recommending to the Joint Committee considering the selection

of the Post Office, Custom House, and Federal Court Building Site at Cape Girardeau, Missouri, an available, suitable, and fitted site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

That said Post Office Inspector, M. J. Deutsch, in fact visited the said City of Cape Girardeau, Missouri, from July 23 to 26, 1940, and from July 29 to 31, 1940, during which time the said Post Office Inspector, M. J. Deutsch, investigated each of the twenty-two (22) parcels submitted in response to the advertisement of the United States of America to submit proposals of sites for inspection.

That the said Post Office Inspector, M. J. Deutsch, did, after considering facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, make a report to said Joint Committee considering the selection of said site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, wherein said Post Office Inspector, M. J. Deutsch, recommended as his first choice of site other than the public property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause.

That copies of said Site Agent's report, made by said Post Office Inspector M. J. Deutsch, were sent with the letter sent to The Honorable, The Attorney-General of the United States requesting the filing of the Plaintiff's (Second) Amended Petition in Condemnation in the above-entitled cause;

That a copy of said report and recommendation of said Post Office Inspector M. J. Deutsch was sent to Harry C. Blanton, United States Attorney of Eastern Judicial District of Missouri, the attorney of record for the United

States of America, the plaintiff in the above-entitled cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, and said copy of said report of said Site Agent, Post Office Inspector M. J. Deutsch, is now in the custody of said Harry C. Blanton, United States Attorney.

It is further agreed that the property sought to be condemned by the plaintiff, the United States of America, in the above-entitled cause is in the nature of a public park upon which is located a Court House used by the Court of Common Pleas of Cape Girardeau County, a Public Library Building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the library building.

The park upon which these structures are located is used for gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a Judge's Chambers, and a law library for the court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council, and the city attorney. There is a basement in this building used largely for a storage space, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn all the property with the improvements thereon except the library building.

[Stipulation contains no Item III.]

Item IV. Public Library and Public Library Building.

It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organizations such as garden clubs, rose societies, historic societies, and other civic and public gatherings.

All of the real estate on which the above-mentioned public library building is located, together with all of the real estate adjacent to said public library building, is included in the description of the property sought to be condemned in the (Second) Amended Petition, in Condemnation, filed by the United States of America, plaintiff, in the above-entitled cause in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, wherein the said Iska W. Carmack is one of the defendants;

That the City of Cape Girardeau, Missouri, will be required to vacate said public library building situated on the said real estate sought to be acquired by the United States of America by condemnation in the above-entitled action upon thirty days' notice by the Government, and, upon notice, to remove said Library and Library Building from Government property within a reasonable time.

The land sought to be condemned was originally conveyed with other land in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the thirteenth day of January, 1806, to have the Seat of Justice of that District permanently fixed

upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should "be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor."

Item V. Facts Regarding the Deeds of 1814 and 1820.

It is agreed by and between the parties hereto that in 1814, the Seat of Justice in the meantime (between 1804 and 1814) been removed from Cape Girardeau to Jackson, the Judges of the Court of Common Pleas in form conveyed this tract to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit claim deed to the inhabitants of the Town of Cape Girardeau collectively "for their use, benefit and behoof forever."

This deed conveyed certain other property not here involved; and concluded with the following paragraph:

> "Provided always that the several tracts or parcels of land thus granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property."

That the said defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in paragraph Eleventh, of Plaintiff's said (Second) Amended Petition in condemnation.

That said defendant, Iska W. Carmack, is an inhabitant,

citizen, taxpayer, and owner of lots in and near the said town (now city) of Cape Girardeau, Missouri.

It is further agreed by and between the parties hereto that the acquisition by the Government by condemnation in the Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause will include all property under and immediately adjacent to the Public Library Building.

Item VI. Agreement to Exchange Property.

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri 1929;

That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri 1929.

Item VII. Harlan Bartholomew.

Several years ago Harlan Bartholomew of St. Louis, Missouri, a city planning expert, made a plan for the City of Cape Girardeau, Missouri.

Item VIII. Architect.

It is agreed by and between the parties hereto that Associate Architect H. A. Tucker had no authority and was given no instructions to examine any sites offered at the City of Cape Girardeau, Missouri, other than the site sought to be condemned, for the Post Office, Custom House, and Federal Court Building, but, acting under instructions dated September 25, 1940, of the said Joint Committee, visited Cape Girardeau between October 1 and October 7, 1940, for the purpose of obtaining such data as necessary to develop studies for utilizing the property sought to be condemned in the Plaintiff's (Second) Amended Petition in Condemnation; and further,

That the said H. A. Tucker had no authority, and was given no instructions to make any investigation of said other sites, and had no authority to make any recommendations to the said Joint Committee regarding the selection of a site for the New Post Office Building, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and, in fact made none.

Item IX. Liaison Officer.

It is agreed by and between the parties hereto, that H. S. Roome, Liaison Officer of the Federal Works Agency, had no authority, and was given no instructions to inspect any sites offered at the City of Cape Girardeau, Missouri, for the Post Office, Custom House, and Federal Court Building, and made none, but, acting under instructions of the

Federal Works Administrator, dated November 20, 1940, the said Liaison Officer H. S. Roome conferred with City Officials at Cape Girardeau, Missouri, from November 24 to November 29, 1940, inclusive, for the purpose of negotiating a mutually satisfactory proposal to be submitted to the Government by the City Officials of Cape Girardeau, Missouri, for the exchange of the property described in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause, for the old Post Office Building and site.

The said Liaison Officer H. S. Roome agreed with the City Officials of Cape Girardeau, Missouri, on the form of proposal to be submitted to the Government for the exchange of property, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

Item X. Petitions of Cape Girardeau, Missouri, Citizens and Taxpayers Filed With the Joint Committee.

That it is agreed by and between the parties hereto that John Sample of Cape Girardeau, Missouri, did, on or about November 19, 1940, cause to be filed a petition with the Joint Committee considering the selection of a site for the Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, signed by six hundred and sixty-seven (667) citizens and property owners of said City of Cape Girardeau, Missouri, protesting any action which would result in part of the said park (property sought to be condemned) being used for Federal building purposes.

Item XI. Project Deferred for the Duration.

That it is agreed by and between the parties hereto that the project of constructing a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, has been deferred for the duration of the War, and the City Officials of the said City of Cape Girardeau, Missouri, were notified of said deferment of said project for the duration on February 19, 1942, by the Administrator of Public Works.

Item XII. Recommendation of the Joint Committee.

That said Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, recommend the acceptance of the City's proposal which had been worked out as to form by the said H. S. Roome, Liaison Officer.

The recommended acceptance of the site sought to be condemned by the Joint Committee was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted to occupy the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time.

Item XIII. Agreement Does Not Limit Right of Iska W. Carmack to Offer Additional Further Evidence.

It is further agreed by and between the parties hereto that the foregoing statements of facts are to be offered in evidence on the part of the defendant, Iska W. Carmack, on the trial of the above-entitled cause without prejudice to the right of said Iska W. Carmack to offer further and additional and other testimony regarding any or all of the facts herein set out.

The Parties Hereto Stipulate and Agree as set out in the above and foregoing statements of facts, and in witness thereof hereunto set their hands and affix their seals this 9th day of November, A. D., 1943, Washington City, District of Columbia, U. S. A.

UNITED STATES OF AMERICA,
Plaintiff,
By B. J. Hasson, Attorney,
Department of Justice.

ISKA W. CARMACK, Defendant.
By L. Lee Bowman,
Cape Girardeau, Missouri,
and I. R. Kelso, Attorney.
I. R. KELSO,
Offices in the First National
Bank, Cape Girardeau, Missouri.

The foregoing statements approved by:

HARRY J. McNERNEY,
Attorney, Federal Works Agency.

The Opinion of the Supreme Court of the State of Missouri Construing the Deed from the Lorimier Heirs of September 11, 18, 20, Is the Law to Be Applied to the Facts in This Case.

The law to be applied to the facts in this case, is the law of the State of Missouri as declared by the Supreme Court of Missouri with respect to the power of the City to exchange or convey the property here involved. The opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimier heirs of September 11, 1820, relied upon by the United States in this case, is, therefore, for convenience and ease of reference, here printed in full, as follows:

> The Board of Regents for Normal School District No. 3 v. Painter, Appellant, 102 Mo. 464, 14 S. W. 938.

"The plaintiff as a body corporate brought this action of ejectment to recover out lot H in the City of Cape Girardeau. The lot in question is the eighth and last parcel of land described in the following deed, dated the eleventh of September, 1820: 'Be it remembered that the undersigned heirs and legal representatives of Louis Lorimier, deceased, namely, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier and Thomas S. Rodney as guardian of Thomas Jefferson Rodney and Polly Rodney, for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged and for divers other good considerations and more particularly for the convenience and encouragement of the inhabitants of the town of Cape Girardeau and owners of lots in or near the same, have given, granted, sold, aliened, quitclaimed and conveyed, and they do hereby give, grant, sell, alien, quitclaim, convey and confirm unto the inhabitants of the

town aforesaid collectively, for their use, benefit and behoof forever, the several lots or parcels of land hereinafter described, viz.: First. The place known and designated in the plan of said town as the **Public Square,** bounded * * * as originally laid off and containing four acres. Second. Lot number 22, in range C, bounded * * * including a spring. Third. Lot number 22, in range A, bounded * * *. Fourth. All the vacant space between the river Mississippi and the front of ranges A, B, G and H, designated on the map by the name of Front Street or Aquamsi; **and generally all the ground appropriated to streets and alleys throughout the whole town, as represented in the plan thereof.** Fifth. The space on the river above the town, in front of out lot number 1, containing two acres and half more or less. Sixth. A hundred feet square in out lot number 2 and adjoining North Street, so as to afford a convenient access to the spring used in that part and to include said spring. Seventh. Six acres of land (as laid off in the map of out lots) situated part in out lot number 2 and part in out lot number 32 and now used as a graveyard; with the condition that the western half thereof shall be and remain appropriated to the Roman Catholic Church. Eighth. An out lot marked h containing about three acres and a quarter, bounded eastwardly by Pacific Street and westwardly by John Scripp's purchase of six acres, on the north by out lot g and on the south by out lot i, which lot, including a large spring, is destined for the establishment of a public school. Together with all and singular the right, title, * * *; provided always that the several tracts or parcels of land granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public use to which they are respectfully intended, and that they, or any part of them, shall never become private property. In testimony whereof, etc.'

The plaintiff put in evidence the foregoing deed, and an ordinance of the City of Cape Girardeau, approved the twenty-fourth of September, 1873, which provided: "That the Mayor of the City of Cape Girardeau be and he is hereby authorized to offer to donate to the regents of the Southeast Missouri Normal School said described lot as an additional inducement to locate said school in said city, and he is authorized to make a deed to said regents of said normal school under the seal of said city, turning over, confirming and quitclaiming all right of the city to said lot to said regents of said school for said purpose, always provided said Southeast Missouri Normal School shall be located in the City of Cape Girardeau and which said lot may be sold and disposed of as the said regents may see proper, to further the erection of the buildings necessary for said school within said city.'

Also a deed dated November 13, 1873, executed pursuant to said ordinance, and purporting to convey lot H to the regents of the Southeast Missouri Normal School.

The plaintiff produced further evidence to the effect that the school was located in the City of Cape Girardeau in 1872 or 1873. The same evidence shows that the building was not located on the lot in question, but in another and different part of the city. **Mr. Painter, the defendant, testified on the part of the plaintiff that he had been in possession of the lot for about ten years, that he made no claim of title to the premises and that they were of the rental value of three dollars per acre per annum. This was all the evidence produced, and on it the Court gave judgment for the plaintiff.**

The defendant objected to the deed from the City of Cape Girardeau to plaintiff, assigning as a reason therefor,

that, under the terms of the deed from the Lorimier heirs to the inhabitants of the town, the present City of Cape Girardeau had no power to convey the premises to the plaintiff and that the deed was therefore void. This objection was overruled, both when the deed was offered in evidence and again by instructions given and refused. If the objection is well taken it disposes of this appeal.

The deed from the Lorimier heirs was made, it will be seen, in 1820. It may be that the town of Cape Girardeau had then been incorporated under territorial laws, but there is no evidence upon that subject in the Record. We are not even informed by the Record or Briefs when or by what law the present City of Cape Girardeau was incorporated. We shall, however, assume that it is an incorporated city with the usual governmental powers and that it has power to hold real property and to sell the same when not dedicated to some particular use. Again the defendant in his Brief says he is defending this case in the interest of the local public schools, but we find nothing to that effect in the pleadings or in the evidence. In short the case is before us on a very unsatisfactory Record.

The owner of lands may devote and dedicate them to public use; and it is now well settled law that a dedication of lands to public use does not require the existence of a corporation in which to vest the title. Such a dedication will be valid without any specific grantee in existence at the time the dedication is made. The public is an ever-existing grantee, capable of taking a dedication for public uses. Rutherford v. Taylor, 38 Mo. 317; Trustees v. Council of Hoboken, 33 N. J. L. 16. **The deed of the Lorimier heirs may, therefore, have full force and effect as a dedication of the various parcels of land therein**

described to public use, though the inhabitants of the town were not at the date thereof incorporated.

The Lorimier heirs by their deed conveyed the various parcels of land 'to the inhabitants of the town aforesaid collectively, for their use, benefit and behoof forever'; and of the particular lot now in question the deed says, 'which lot including a large spring is destined for the establishment of a public school'. There is the further clause to the effect that the several parcels of land 'shall remain forever affected and appropriated to the public uses' to which they are devoted, and shall 'never become private property'.

It is clear from these clauses of the deed that the donors intended that this lot should be forever used by the inhabitants of the town for the establishment of a public school; that the lot itself should stand affected with and appropriated to that use, and that it should never become private property. **Conceding that the present City of Cape Girardeau has invested in it as a corporation the right and power to manage and control this property, still it does not follow that it has the power to alien or convey the same. With the concession just made the city is but a trustee to manage the property for the uses and purposes to which it was devoted by the donors. It may control and regulate the use of the property, but it has no right to devote the same to private uses, or even to public uses different from those specified in the deed.** Cummings v. The City of St. Louis, 90 Mo. 259. Where land has been dedicated to specific limited and defined purposes, the subject of the grant cannot be used for another and a different purpose. Price v. Thompson, 48 Mo. 361, citing with approval Warren v. The Mayor of Lyons City, 22 Iowa 351.

But the plaintiff insists that the city by conveying this property to the plaintiff is carrying out the very purposes for which the lot was set apart by the Lorimier deed, and that the normal school is a public school within the meaning of that deed.

This normal school was established under the act of March 22, 1873 (Acts of 1873, p. 79), and is conducted under the provisions of article 3 of chapter 150, Revised Statutes, 1879. It is one of the three normal schools established in this state, the state being divided into three districts for such purposes. Section 7167 provides that the Board of Regents shall require applicants for admission to sign and file with the secretary of the board a declaration of intention to follow the business of teaching in the public schools of the state. These schools, it will be seen, were established for the primary purpose of trainin and educating school teachers. While they are supported, in the main, from the public treasury and are part of the school system of this state, still we think it is clear they are not public schools within the meaning of the Lorimier deed. The grantors therein say they made it "more particularly for the convenience and encouragement of the inhabitants of the town of Cape Girardeau and of the owners of lots in and near the same".

The donors did not set this lot apart for the benefit of a few persons who might elect to follow a particular calling, but they intend it to be appropriated to a school which would be open to all, regardless of any declared intention to follow a particular avocation. That a school established in conformity with the Lorimier deed may be under the control of the laws concerning public schools we have no doubt; but we are also of the opinion that the donors used the words 'public school' in a general and popular sense, and by it they meant a school which would be open to all

of the inhabitants of the town. This being so the city had no right or power to convey the lot to the plaintiff. It could no more convey the lot to plaintiff than it could the other parcel called a public square. As said in Trustees v. Council of Hoboken, supra, when speaking of the powers of local authorities: 'They cannot sell the lands so dedicated, nor release nor extinguish the use for which they were dedicated, nor employ them in any way variant from the purposes for which they were designed'.

Our conclusion is that the deed from the city to the plaintiff was an effort on the part of the city to devote this property to purposes other and different from that contemplated by the donors, and that the deed is worthless and conveyed nothing. The city has no power to donate this property to plaintiff. The judgment is, therefore, simply reversed. All concur." (Emphasis added.)

Protest of the County Court of Cape Girardeau County Against Disposition of Court House Park Site and Building.

"State of Missouri,
County of Cape Girardeau.—ss.:
November Term, 1940.

In the County Court of said County on the 25th day of November, 1940, the following, among other proceedings, were had, viz.:

In Re: Disposition of Cape Girardeau Court of Common Pleas, for U. S. Post Office site—
Resolution.

Whereas, on this the 25th day of November, 1940, it being the fourth day of the November term of said Court, the following resolution is hereby adopted, to-wit:

Whereas, at all times since the organization of the Cape Girardeau Court of Common Pleas, the courthouse and facilities for the use of said court have, in the major part, been provided by Cape Girardeau County, Missouri, said county having in 1887 and 1888 provided for about nine-tenths of the expense of enlarging and improving the courthouse as it now stands, and all subsequent maintenance expenses including street improvements, and the furnishings and equipment for said courthouse have been in the major part paid by this county up to the present time, with only a minor part of any of said expenses having ever been paid by the city of Cape Girardeau, and this county has, therefore, in the course of time become financially interested to a substantial extent in said courthouse building and the various furnishings, equipment and improvements thereof; and

Whereas, this County Court of said county has become advised of a proposal for said courthouse, thus furnished and improved, to be disposed of by the Mayor and Council of the City of Cape Girardeau without any consultation with this County Court and without any recognition of the interest of this county therein;

Now, Therefore, in consideration of the premises and of the public and the financial interest which this county has in said courthouse building and the furnishings, improvements and equipments thereof, this County Court does protest against any such disposition of the same without recognition of the rights and interests of the county therein and without consultation with this Court as the official representative of said County.

State of Missouri,

County of Cape Girardeau.—ss.:

I, Louis H. Schrader, Clerk of the County Court, in and for said County, hereby certify the above and foregoing to be a true copy of the proceedings of our said County Court, on the day and year above written, as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Jackson, Missouri, this the 18th day of April, 1944.

(Seal)

LOUIS H. SCHRADER,
Clerk of the County Court,
Cape Girardeau County, Missouri."